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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Tenth Circuit was not officially reported; it is unofficially reported at 59 LRRM 2993. The second opinion of the Court of Appeals is officially reported at 349 F. 2d 408 and is unofficially reported at

60 LRRM 2244; it is reprinted at R. 90-96. The opinion of the District Court is reported at 231 F. Supp. 33 and is unofficially reported at 56 LRRM 2815; it is reprinted at R. 78-85.

JURISDICTION

The original judgment of the Court of Appeals was entered on July 22, 1965. On October 8, 1965, the Court of Appeals vacated that judgment and substituted a new judgment. (R. 97) The original petition for certiorari was filed on October 7, 1965; on December 13, 1965, a supplemental petition for certiorari was filed. This Court granted the petition on February 21, 1966. (R. 98) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Railroad Adjustment Board may determine a dispute arising from a claim that a railroad has failed to assign work as required by a collective bargaining agreement without a determination of the rights of other employees represented by another union to whom the work was assigned, where the other union was given notice of the proceeding before the Adjustment Board and declined to participate, and has not filed a claim with the Adjustment Board?

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act, as amended (48 Stat. 1185, 45 U.S.C. Secs. 151-164), and the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151-168) are set forth in the Appendix, *infra*.

STATEMENT OF THE CASE

This action was brought by the Transportation-Communication Employees Union (formerly "The Order of Railroad Telegraphers" and herein referred to as "TCU") against the Union Pacific Railroad Company (herein referred to as the "Carrier") to enforce an Award and Order of the National Railroad Adjustment Board, Third Division (herein referred to as the "Adjustment Board"). (R. 1-4)

The TCU, as the duly authorized and designated representative under the Railway Labor Act of the crafts or classes of employees commonly known as station, tower, and telegraph employees (R. 1-2), filed a claim with the Carrier that the Carrier had violated the collective bargaining agreement between the parties by not assigning the operation of certain machines in the Carrier's yard office in Las Vegas, Nevada, to employees represented by TCU. The Carrier had assigned the work to employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (herein referred to as "BRC"). (R. 91)

The dispute was not settled by the parties on the property and thereafter TCU referred the dispute to the Adjustment Board. Section 3, First (i), 45 U.S.C. § 153, First (i)). TCU's request for relief was (R. 5):

> "(c) that for such violations the Carrier shall compensate the senior idle employe or employes covered by the Telegrapher's Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location."

The Adjustment Board notified BRC of the pendency of the proceedings, the date set for the hearing, and that BRC would be permitted to appear and participate. (R. 75) The BRC's reply to the Adjustment Board was that the controversy before the Adjustment Board concerned a dispute between the Carrier and TCU over an interpretation of the agreement between those two parties involving employees represented by TCU, that employees represented by BRC were not involved in that dispute, and that it would not participate in the proceedings before the Adjustment Board. (R. 76-77)

The Adjustment Board thereafter considered the merits of TCU's claim and on July 14, 1961, issued Award No. 9988 and an accompanying Order sustaining TCU's claim and directing the Carrier to make the Award effective. (R. 5-71) The Carrier refused to comply with the Award and Order of the Adjustment Board, whereupon this enforcement action was brought, pursuant to Section 3, First (p) of the Railway Labor Act (45 U.S.C. § 153 First (p)).

On September 13, 1963, the Carrier filed a motion to dismiss TCU's complaint setting forth three grounds (R. 72), the first two of which were denied by the District Court. (R. 78) The substance of the third ground for dismissal, which was granted by the District Court, was that TCU had failed to name an indispensable party, namely BRC, to the enforcement action. The District Court dismissed the complaint with leave for TCU to file, within 30 days of the Order, an amended complaint making BRC a party to the action. (R. 85) TCU did not make BRC a party and on September 30, 1964, the District Court granted the Carrier's motion and entered a final judgment of dismissal

dismissing the complaint for failure to make BRC a party. (R. 87-88) An appeal was taken by TCU from the final judgment of the District Court to the Court of Appeals for the Tenth Circuit. (R. 88)

On July 22, 1965, the Court of Appeals issued an opinion and judgment in which the Court did not pass on the sole question presented before it, to-wit, whether BRC was an indispensable party to the enforcement action, but instead vacated and set aside the Order of the Adjustment Board, and remanded the case to the District Court with instructions to remand it to the Adjustment Board for further proceedings. *The Order of R.R. Telegraphers* v. *Union Pacific R.R.*, 59 LRRM 2993 (10th Cir. 1965) (not officially reported).

The Court of Appeals held that the dispute before the Adjustment Board involved a jurisdictional dispute between TCU and BRC concerning a question of which group of employees was entitled to perform certain work, that BRC "for all practical purposes" became "parties" to the Adjustment Board proceeding, and that the Adjustment Board was required to exercise its jurisdiction "over the whole dispute at one time." 59 LRRM at 2996. The Court remanded the case for further proceedings in accordance with its opinion.

On or about September 16, 1965, the Carrier filed with the Court of Appeals a motion requesting leave to file a petition for rehearing out of time, and a petition for rehearing, concerning the part of the Court's judgment which directed that the case be remanded to the Adjustment Board for further proceedings.

On October 7, 1965, TCU filed with this Court a petition for certiorari to review the part of the judgment of

the Court of Appeals vacating and setting aside the Order of the Adjustment Board.

The following day, on October 8, 1965, without acting on the motion of the Carrier for rehearing, the Court of Appeals withdrew its opinion and judgment entered on July 22, 1965, and in their place entered a new opinion and judgment. (R. 90-97) The latter judgment affirmed the disposition of the case by the District Court, namely, a dismissal of the complaint. There was no direction, as there had been in the first judgment, that the case be remanded to the Adjustment Board for further proceedings.

Although the first judgment of the Court of Appeals reversed the District Court and the second judgment affirmed the lower Court, the holding of the Court of Appeals was the same to the extent of declaring the Order of the Adjustment Board void and unenforceable. The Court's rationale also remained the same. The two opinions are virtually identical except for the final two paragraphs. In its initial opinion, in keeping with its decision that the Order of the Adjustment Board was unenforceable and that the case be remanded to the Adjustment Board, the Court of Appeals concluded (*The Order of R.R. Telegraphers* v. *Union Pacific R.R.*, 59 LRRM 2993 at 2996):

> "Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practices, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. ... When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order."

In its second opinion, consistent with its decision that the Order of the Adjustment Board was unenforceable and that the case not be remanded to the Adjustment Board, the Court concluded (R. 96):

> "The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. A complete hearing would include all issues, practices, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make an initial determination, if petitioned to act, before a court can act on a complete proceeding should it be requested to do so. Slocum v. Delaware, L. & W. R.R., 339 U.S. 239; Order of Railway Conductors v. Pitney, 326 U.S. 561.
>
> "The District Court dismissed the appellant's petition for failure to join an indispensable party—the Clerks. Had these parties been joined and appeared presumably the matters relating to their position and contract could have been presented to the court thereby filling the same void we find to exist. Our difference with the District Court is only in that the Board should under the doctrine of primary jurisdiction have the first opportunity to consider the entire controversy including the Clerks' contract."

On December 13, 1965, TCU filed a Motion for Leave to File a Supplemental Petition, and a Supplemental Petition for a Writ of Certiorari to review the last judgment of the Court of Appeals, and on February 21, 1966, the petition was granted. (R. 98)

SUMMARY OF ARGUMENT

The determination of the Court below, that TCU's claim before the Adjustment Board created a jurisdictional dispute and the Award and Order of the Adjustment Board was unenforceable because the Adjustment Board failed to determine the rights of employees represented by BRC, is erroneous for several reasons.

Initially, the Court of Appeals erred in finding that TCU's claim before the Adjustment Board raised a jurisdictional dispute between employees represented by TCU and employees represented by BRC concerning which group of employees was entitled to the assignment of particular work. TCU's claim concerned a breach of the collective bargaining agreement between the Carrier and TCU. The relief requested by TCU, and granted by the Adjustment Board, was the award of money damages to employees represented by TCU because of the breach of the agreement. TCU did not seek an award that employees represented by BRC are not entitled to perform the work, nor does the Award and Order of the Adjustment Board in this case mandate such result. Since the rights of employees represented by BRC are derived solely from the collective bargaining agreement between the Carrier and BRC, their rights could not be affected by the agreement between the Carrier and TCU, nor could they be affected by the determination of the Adjustment Board of the rights of TCU employees under their agreement with the Carrier. Accordingly, there was no reason to determine the rights of employees represented by BRC when no dispute existed between BRC and the Carrier concerning such rights arising from their agreement.

Furthermore, assuming that TCU's claim did involve a jurisdictional dispute between TCU and BRC, the

Adjustment Board does not have jurisdiction to determine such aspect of the dispute. The Court of Appeals' ruling to the contrary is at variance with the plain language of Section 3, First (i) of the Railway Labor Act which sets forth the jurisdiction of the Adjustment Board as limited to disputes between employees and employers over the application or interpretation of collective bargaining agreements.

In addition, other provisions of Section 3 of the Railway Labor Act make it clear that Congress did not intend the Adjustment Board to resolve jurisdictional disputes. This is made even clearer by comparing provisions of the Railway Labor Act with Section 10(k) of the National Labor Relations Act which specifically empowers the National Labor Relations Board to "hear and determine" jurisdictional disputes.

The decisions of this Court relied upon by the Court of Appeals are not dispositive of the issue. We know of no case in which this Court has ruled on the issue of whether the Adjustment Board has jurisdiction to determine, and is required to determine, jurisdictional disputes. To the extent that this Court has considered the issue in *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366 (1955), however, the conclusions drawn by the Court in that case are diametrically opposed to the conclusion of the Court of Appeals.

ARGUMENT

The Court of Appeals viewed this case as involving a jurisdictional dispute between two groups of employees, one represented by TCU and the other represented by BRC, as to which group is entitled to perform certain work. The Court was of the opinion that although the claim before the Adjustment Board pertained only to an alleged violation of an agreement

between TCU and the Carrier, with TCU seeking damages for the alleged breach of such agreement, the nature of the claim resulted in BRC "for all practical purposes" (R. 96) becoming a party to the administrative proceedings and required the Adjustment Board to exercise authority "over the whole dispute at one time" (R. 95) and to adjudicate the rights of the employees represented by BRC as well as those represented by TCU—a ruling not urged by any of the parties, either before the Adjustment Board or in the Courts below.

The Court of Appeals concluded that the prior proceeding before the Adjustment Board was incomplete because it did not dispose of "all issues, practices, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties." (R. 96)

Thus, the Court below determined that TCU's claim involved a dispute over an assignment of work, and the Adjustment Board had jurisdiction to determine and was required to determine, not whether the Carrier had breached its agreement with TCU but which group of employees was entitled to perform the work involved herein.

The Court of Appeals was in error on two grounds. First, the Court erred in finding that TCU's claim before the Adjustment Board involved a jurisdictional dispute. Second, to the extent that TCU's claim did involve a jurisdictional dispute, the Court erred in holding that the Adjustment Board had jurisdiction to determine and was required to determine that aspect of TCU's claim.

The first ground is discussed in part I of this brief and the second ground is discussed in part II.

I. THE COURT BELOW ERRED IN DETERMINING THAT TCU'S CLAIM INVOLVED A JURISDICTIONAL DISPUTE DETERMINABLE BY THE AJUSTMENT BOARD.

The term "jurisdictional dispute" was defined by this Court in *Carey* v. *Westinghouse,* 375 U.S. 261 (1964) at 263, as a dispute:

> "... involving two unions and the employer ... as to whether certain work should be performed by workers in one bargaining unit or those in another."

Inherent in such dispute is the proposition that only one of two groups of competing employees has a right to perform the work in dispute and that a determination that one group of employees is entitled to perform the work must necessarily determine that the other group of employees does not have the right to perform the work.

The dispute in this case does not fit within the definition of a jurisdictional dispute. TCU's claim before the Adjustment Board was that the Carrier had violated their collective bargaining agreement by not assigning certain work to employees represented by TCU as required by the agreement. (R. 5) The claim asked an adjudication that employees represented by TCU were entitled to do the work on the basis of the collective bargaining agreement between the parties which gave the employees it represents the right to perform such work.

The relief requested was that the Carrier compensate employees represented by TCU who would have performed the work had the Carrier complied with the

agreement. (R. 5). The relief sought by TCU was not that employees represented by BRC were not entitled to perform the work in dispute and that such employees should be dispossessed of such work. It is clear that an agreement between the Carrier and TCU setting the terms and conditions of employment of employees represented by TCU could not determine the rights of employees represented by BRC under the BRC agreement.

This obvious fact was recognized by BRC and formed the basis of its declination to participate in the Adjustment Board's proceedings with respect to TCU's claim. (R. 76-77) As pointed out by BRC, the dispute pending before the Adjustment Board concerned an interpretation and application of the agreement between the Carrier and TCU with which BRC was not involved. BRC would have no claim against the Carrier unless and until the Carrier took some action which BRC considered as constituting a violation of the Carrier's agreement with BRC, and at such time, BRC's remedy would be to file a claim and, if not adjusted in conference, progress it to the Adjustment Board alleging such violation.

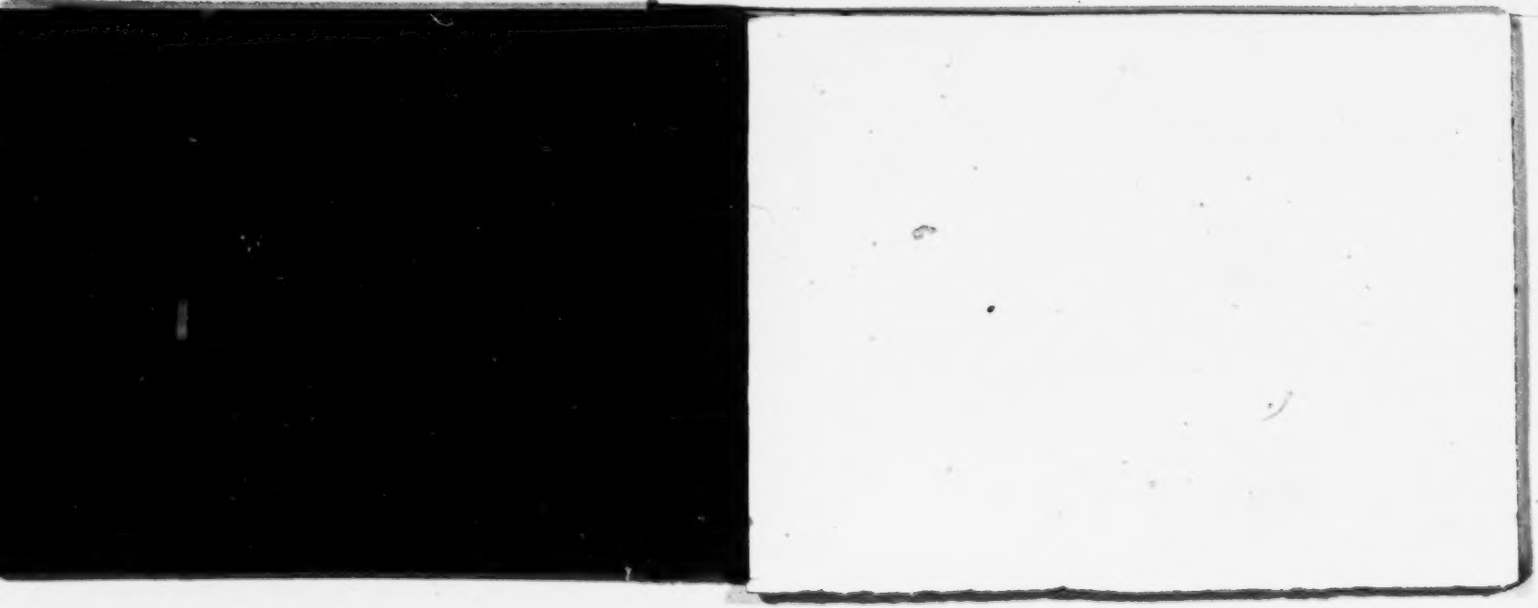
Thus the determination by the Adjustment Board that employees represented by TCU are entitled to perform the work meant no more than that the work involved was within the scope of the collective bargaining agreement between those parties. It did not mean that such work *could not* be included within the scope of some other agreement between the Carrier and another union representing a different group of employees. Such a determination is a far cry from what is termed a "jurisdictional dispute"; it is simply a dispute over the meaning of an agreement.

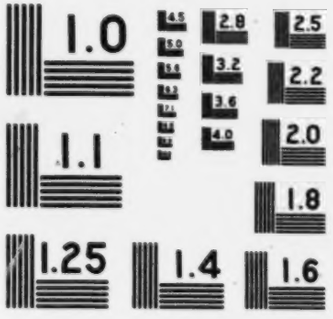
Actually the present case is even farther removed from a "jurisdictional dispute" than the preceding discussion indicates since TCU's claim in this case did not seek an assignment of the work but merely money damages for breach of the agreement. Thus, the Adjustment Board's Award merely required the Carrier to (R. 5):

> "compensate the senior idle employe or employes covered by the Telegraphers' Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location."

The Court of Appeals for the Eighth Circuit, in *Order of R.R. Telegraphers* v. *New Orleans T. & M. Ry.*, 229 F. 2d 59 (1956), has expressed its view that the relief sought before the Adjustment Board, in disputes similar to that involved in this case, is of importance in determining whether the presence of other parties before the Adjustment Board and the court is required.

In that case, the facts underlying the dispute were as follows. In 1943 the BRC obtained an award and order from the Adjustment Board sustaining its claim that employees represented by the BRC were entitled to the assignment of certain work. TCU attempted to intervene in the Adjustment Board proceeding but was refused intervention by the Adjustment Board. TCU was likewise unsuccessful in an action brought in the district court to have the Adjustment Board's award and order declared unenforceable. *Order of Railroad Telegraphers* v. *New Orleans T. & M. Ry.*, 61 F. Supp. 869, 156 F. 2d 1, cert. den. 329 U.S. 758, reh. den. 329 U.S. 829.





Pursuant to the award the carrier replaced employees represented by TCU with employees represented by BRC. Thereafter, TCU filed a claim with the Adjustment Board claiming that employees it represented were entitled to perform the same work. The remedy sought by TCU and granted by the Adjustment Board was that "all employees adversely affected by these violative acts of the carrier shall be restored to their former positions. . ." *Order of Railroad Telegraphers* v. *New Orleans, T. & M. Ry.*, 229 F. 2d 59, footnote 1.

The carrier refused to comply with the award and order of the Adjustment Board and TCU brought suit for enforcement. The carrier's contention, sustained by the district court, was that the award was unenforceable because, *inter alia,* BRC had not been given notice of the proceedings before the Adjustment Board (229 F. 2d 59, footnote 2). The district court's conclusions of law, adopted by the Court of Appeals, were set forth in the Court of Appeals' opinion (229 F. 2d at 64). The first paragraph of those conclusions, pertinent to the present discussion, was as follows:

> "1. The intent and purpose of former Award No. 2254 in favor of the Clerks was to give the disputed clerical work . . . to members of the Clerks' organization. The intent and purpose of the subsequent Award No. 4734 of the same division of the Adjustment Board now under consideration was to give the same disputed clerical work . . . to the members of the Telegraphers' organization. *Both organizations claimed the work in controversy and not merely pay for the work performed.*
>
> ". . . To now give the disputed clerical work to the Telegraphers . . . *will of necessity take that work away from a member of the Clerks' organization who is now performing the clerical work.*

> . . . The controversy now before the Court therefore involves conflicting claims of the Clerks and Telegraphers to the same clerical work." (Emphasis added.)

The district court specifically declined to pass on the carrier's additional contention that BRC was an indispensable party to the enforcement action. The Court of Appeals affirmed the district court's holding and added that the complaint should be dismissed also because the BRC had not been made a party to the enforcement action. The Court reasoned (229 F. 2d at 67):

> "*Enforcement* of Award No. 4734 prayed for in the plaintiff's complaint in this suit *would necessarily include the issuance by the Federal Court of a mandate requiring the defendant carrier to dispossess a clerk now in its employ of his job.* The Clerks' claim of right to the job has been determined by an Award of the Board and his interest in the suit to dispossess him of it is real and obvious." (Emphasis added.)

Although we do not agree with the conclusion of those courts that under the factual circumstances of the *N. O. T. & M.* case the BRC was required to be given notice of the proceedings before the Adjustment Board and would be an indispensable party to the enforcement action, it is clear that the courts distinguished the factual situations in that case from situations such as presented herein.

In the present case, the relief sought and granted by the Adjustment Board would not require "the issuance by the Federal Court of a mandate requiring the defendant carrier to disposses a clerk now in its employ of his job." Unlike the *N. O. T. & M.* case in which

"both organizations claimed the clerical work in controversy and not merely pay for the work performed," in the present case only TCU has filed a claim and such claim seeks relief only in the form of monetary compensation and not an assignment of the work.

II. EVEN IF TCU'S CLAIM BEFORE THE ADJUSTMENT BOARD DID INVOLVE A JURISDICTIONAL DISPUTE THE ADJUSTMENT BOARD WAS CORRECT IN DETERMINING TCU'S CLAIM WITHOUT DETERMINING THE RIGHTS OF EMPLOYEES REPRESENTED BY BRC.

The Court of Appeals held that the Adjustment Board could not determine the dispute arising from a claim that the Carrier had assigned work in violation of a collective bargaining agreement between it and TCU without a determination of the rights of employees represented by BRC to whom the work was assigned, even though BRC was given notice of the proceedings before the Adjustment Board and declined to participate, and even though neither BRC nor the Carrier had filed a claim with the Adjustment Board concerning the meaning of their agreement.

Neither the provisions of the Railway Labor Act nor cases construing the Act support the holding of the Court below.

A. The Decision of the Court Below Is Contrary to the Provisions of the Railway Labor Act

1. The jurisdiction of the Adjustment Board is limited to determining disputes between employees and carriers which are the subject of claims filed with it

The jurisdiction of the Adjustment Board is set forth in Section 3, First (i) of the Railway Labor Act (45 U.S.C. § 153, First (i)), and is confined to:

> ". . . disputes between an employee or group of employees and a carrier or carriers growing out of

> grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ."

There is no provision in the Act authorizing a union to file a claim with the Adjustment Board that it is entitled to the assignment of work except in the form of a claim that a carrier breached an agreement by not assigning the work in question to employees it represents.

Notwithstanding the absence of such provision, however, the Court of Appeals would have the Adjustment Board assert jurisdiction to determine the rights of employees represented by the BRC, which has not filed a claim with the Adjustment Board concerning the work involved in TCU's claim, and indeed, has no dispute at all with the Carrier concerning the work.

To sustain the holding of the Court of Appeals would require a finding that the Adjustment Board has the power to create a dispute where none exists, and to determine the rights of employees under an agreement when both parties to the agreement concur as to its interpretation and application and have not requested the Adjustment Board to intrude.

Furthermore, the jurisdiction of the Adjustment Board under Section 3, First (i) is confined to disputes between employees and carriers whereas jurisdictional disputes are disputes between two groups of employees with the employers characterized as no more than " 'the helpless victims of quarrels that do not concern them at all.' " *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union* (*Columbia Broadcasting System*), 364 U.S. 573, 580-581 (1961).

In addition, Section 3 First (i) provides that disputes between the parties:

> ". . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such dispute; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board. . . ."

In accordance with the mandate of the statute the Adjustment Board's Rules of Procedure require that no dispute be submitted to it unless the parties previously have conferred on the property. (29 Code of Federal Regulations, Chap. III, Sec. 301.2.)

Thus, since no dispute between the BRC and the Carrier has been "handled in the usual manner" on the property, and since the dispute has not been "referred by petition of the parties or by either party" to the Adjustment Board, the rules of the Adjustment Board would require it to refuse to determine the meaning of the BRC agreement because of prematurity.

The holding of the Court below requiring the Adjustment Board to determine the rights of employees represented by BRC would require the Adjustment Board to disregard its rules which are based on the clear language of Section 3, First (i) which requires that a claim first be "handled in the usual manner" on the railroad.

The Court of Appeals' decision extends the jurisdiction of the Adjustment Board far beyond the plain and unambiguous limits set forth in Section 3, First (i) of the Railway Labor Act and must be reversed.

2. Other provisions of Section 3 of the Railway Labor Act show that Congress did not intend the Adjustment Board to determine jurisdictional disputes

Basic to the Court of Appeals' decision is its assumption that Congress provided the Adjustment Board with jurisdiction in dealing with jurisdictional disputes to make a "complete disposition of the dispute as to all concerned parties." (R. 96) A review of the provisions of the Railway Labor Act dealing with the Adjustment Board, however, makes it clear that such is not the case.

Section 3, First (h) of the Act (45 U.S.C. § 153, First (h)) sets forth the composition of the Adjustment Board. The introductory paragraph provides:

> "The said Adjustment Board shall be composed of four divisions, *whose proceedings shall be independent of one another,* and the said divisions as well as the number of their members shall be as follows:" (Emphasis added.)

The Section thereafter proceeds to establish four separate divisions, each to have exclusive jurisdiction over disputes involving employees within their respective divisions.

It is not unusual for employees in a particular division of the Adjustment Board to claim that their collective agreement covers work being performed by employees subject to another division. Such situations have arisen with respect to employees employed as signal department employees, represented by the Brotherhood of Railroad Signalmen, who are within the jurisdiction of the third division of the Adjustment Board, and electrical workers, represented by the International Brotherhood of Electrical Workers, who

are within the jurisdiction of the second division of the Adjustment Board.[1] In such cases, there is nothing in the Railway Labor Act to prevent each of the groups of employees from filing claims before their respective divisions of the Adjustment Board and from receiving sustaining awards.

Furthermore, since the divisions are independent, we know of no procedure whereby one division of the Adjustment Board could obtain jurisdiction to determine the rights of employees within the jurisdiction of another division of the Adjustment Board.

It is true that this problem would not be presented in this case because telegraphers and clerks both are within the jurisdiction of the third division of the Adjustment Board. However, this fact presents even a stronger argument, on equitable grounds, for Congress not providing for the Adjustment Board to determine jurisdictional disputes between such parties.

The Adjustment Board is a bipartisan organization made of an equal number of labor organizations' representatives and Carriers' representatives. (Section 3, First (a), 45 U.S.C. § 153, First (a).) An additional and neutral member of the Adjustment Board is ap-

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[1] For example, see Awards of the Adjustment Board (Third Division) Nos. 3999, 4471, and 8217. Other examples include *Hunter* v. *Atchison, Topeka & Santa Fe Ry.*, 171 F. 2d 594 (7th Cir. 1948), which involved work claimed to be covered both by the agreements of trainmen employees within the jurisdiction of the first division, and porters, within the jurisdiction of the third division; and *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (8th Cir. 1950), which involved work claimed to be covered both by the agreements of trainmen employees within the jurisdiction of the first division, and of clerks, within the jurisdiction of the third division.

pointed only when there is a deadlock among the partisan members in reaching a majority decision on a dispute before it. (Section 3, First (l) and (n), 45 U.S.C. § 153, First, (l) and (n).)

If the Adjustment Board would have jurisdiction to determine jurisdictional disputes, as contemplated by the Court of Appeals in the present case, it would mean that in each case it would be the Carriers that would decide to whom the disputed work should be assigned.

In the present case, for example, if a dispute between the telegraphers and clerks should be submitted to the third division, it is almost foregone that the telegraphers' representative would vote that the work should be assigned to telegrapher employees, and the clerks' representative would vote in favor of assigning the work to clerk employees. This split among the labor organizations' representatives would enable the carriers' representatives, in each case, to decide the issue.

Surely, it should require the most explicit language to conclude that Congress intended the Adjustment Board to have jurisdiction to determine a dispute in which one group of representatives would have power to determine the dispute in every instance. Nothing resembling such language is present.

Furthermore, in the negotiation of agreements (where the right to strike exists) a carrier could deliberately avoid its bargaining obligations by agreeing to assign the work to both groups of employees and then under the grievance procedure (where there is no right to strike) could unilaterally decide (through car-

rier representatives on the Adjustment Board with the support of one labor member) where it wanted the work assigned. Surely, the Adjustment Board was not designed to replace the bargaining table as the site where collective bargaining agreements are to be fashioned.

The only provision of the Railway Labor Act cited by the Court of Appeals to support its position is Section 3, First (j) (45 U.S.C. § 153, First (j)). This Section provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

For many years, it was the position of the organizations represented on the Adjustment Board that where one organization filed a claim against a carrier asserting that the carrier had violated its agreement with the organization, the two parties were the only ones "involved" in the dispute and no other party was required by the statute to be given notice of the proceedings. Some courts disagreed. The basis of the disagreement was the courts' belief that the construction of Section 3, First (j) required that all persons who do, or may, have an interest in the proceedings must be afforded an opportunity to participate. See, for example, *Brotherhood of Railroad Trainmen* v. *Templeton,* 181 F. 2d 527 (8th Cir. 1950); *Allain* v. *Tummon,* 212 F. 2d 32 (7th Cir. 1954); *The Order of Railroad*

Telegraphers v. *New Orleans, T. & M. Ry.*, 229 F. 2d 59 (8th Cir. 1956), *cert. den.* 350 U.S. 997.[2]

As a result of these decisions, the labor organization representatives changed their position and at the present time notice is given to any party who does, or may, have an interest in the proceedings before the Adjustment Board. Pursuant to such change in policy, notice of the proceedings before the Adjustment Board in this case was given to BRC. (R. 75) Thus, there is no issue in this case whether there was compliance with Section 3, First (j) of the Railway Labor Act.

Furthermore, even assuming that BRC was "involved" in the dispute within the meaning of Section 3, First (j), and was required to be given notice of the proceedings before the Adjustment Board, it would not be dispositive of the issue whether the Adjustment Board had jurisdiction to determine, and was required to determine, the rights of employees represented by BRC.

Section 3, First (j) of the Railway Labor Act merely provides for the procedure to be followed by the Adjustment Board in hearing disputes brought before it; it does not pertain to the jurisdiction of the Adjustment Board. Certainly it would be beyond reasonable argument to contend that because the Adjustment Board had authority to notify BRC of the pend-

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[2] The decisions of the Courts of Appeals on this subject are criticized in Kroner, Minor Disputes Under the Railway Labor Act, 37 N.Y.U. Law Review 41, 54-57 (1962). This Court has never ruled on the issue. See *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 370-373 (1955). It has indicated, however, that even if the Courts of Appeals are correct in holding that notice be given to third parties pursuant to Section 3, First (j), that such requirement "does not approach constitutional magnitude." *Whitehouse, supra,* at 371-372.

ency of TCU's claim and to invite BRC to participate if it desired (an invitation which BRC declined (R. 76-77)) that the Adjustment Board thereby acquired jurisdiction to determine the rights of employees represented by BRC, under BRC's agreement.

The jurisdiction of the Adjustment Board is defined in Section 3, First (i), and as we showed above, it extends no further than determining disputes brought before it in the form of a claim that one of the parties to a collective bargaining agreement has breached that agreement. Since neither the Carrier nor BRC has filed a claim with the Adjustment Board, that tribunal lacks jurisdiction to make any determination of the rights of employees under such agreement.

The situation is completely different under the National Labor Relations Act, as amended (herein referred to as the "NLRA"). Under Section 10(k) of the NLRA (29 U.S.C. § 160 (k)), the National Labor Relations Board (herein referred to as the "NLRB") is specifically charged to "hear and determine" jurisdictional disputes. This Court has held that such mandate requires the NLRB to make a decision "that one or the other [group of employees] is entitled to do the work in dispute." *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union (Columbia Boadcasting System)*, 364 U.S. 573 (1961). Referring to the procedure the NLRB should follow in determining jurisdictional disputes, this Court stated (at 579):

> "*This language also indicates a congressional purpose to have the Board do something more than merely look at* prior Board orders and certifications or *a collective bargaining contract* to determine whether one or the other union has a clearly defined statutory or contractual right to have the

employees it represents perform certain work tasks." (Emphasis added.)

Pursuant to this Court's decision in the *C.B.S.* case, the NLRB now decides jurisdictional disputes cases on the basis of such factors as, but not confined to, the skills and work involved, certifications by the NLRB, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators and joint boards, the assignment made by the employer, and the efficient operation of the employer's business. *Lodge No. 1743, IAM, and Jones Construction Co.*, 135 NLRB 1402 (1962).

There is no provision in the Railway Labor Act which even remotely is akin to Section 10(k) of the NLRA, which was added to the Act in 1947. Under Section 3, First (i) of the Railway Labor Act the jurisdiction of the Adjustment Board is limited solely to a determination of whether the collective bargaining agreement has been violated while under Section 10(k) of the NLRA, the collective bargaining agreement merely is to be considered a factor, among many others, in determining which of two groups of employees is entitled to the assignment of work. It would be fully in keeping with its mandate under Section 10(k) of the NLRA, for the NLRB to award work to a group of employees not having a collective bargaining agreement with the employer because of the presence in its favor of a preponderance of other factors as opposed to the other group of employees which does not possess such other factors but merely an agreement to do the work. Such a determination would be wholly improper under Section 3, First (i) of the Railway Labor Act.

A further comparison between Section 3, First (i) of the Railway Labor Act and Section 10(k) of the NLRA, lends additional support to the conclusion that Congress did not intend the Adjustment Board to have jurisdiction to determine jurisdictional disputes. First, it is apparent from Section 10(k) of the NLRA that Congress was entirely capable of making it unmistakably clear if it meant to empower a tribunal to "hear and determine" jurisdictional disputes. It did so in the NLRA, and did not do so under the Railway Labor Act.

Second, each of the difficulties inherent in the Adjustment Board having jurisdiction to determine jurisdictional disputes is not present under the NLRA. Thus, the NLRB is a single body, as opposed to the Adjustment Board which is composed of four "independent" divisions, and the problem of conflicting jurisdictional disputes awards is obviated. Furthermore, the NLRB is a nonpartisan body as opposed to the Adjustment Board which is bipartisan and the inequitable result of the employers in each case determining jurisdictional disputes which would result if the Adjustment Board could make such determinations, cannot occur under the NLRA.

It accordingly is clear that although the Court of Appeals seeks to interpolate Section 10(k) of the NLRA into the Railway Labor Act, such judicial interpolation not only is unauthorized, but is contrary to the applicable provisions of the Railway Labor Act and the whole structure and purpose of the National Railroad Adjustment Board.

B. The Decision of the Court Below Is Not Supported by Decisions of This Court; to the Extent That This Court Has Considered the Issue Herein, the Conclusions Reached by This Court Are Contrary to the Decision of the Court Below

The Court of Appeals considered its determination required by precedent but, as will be shown below, the cases relied on by the Court were not concerned with nor even mentioned the issue presented in this case. We know of no cases in which a court has ruled on the issue of whether the Adjustment Board has jurisdiction to determine, and is required to determine, jurisdictional disputes, and in the only case, also to be discussed below, in which this Court considered the issue, the Court took a position diametrically opposed to that taken by the Court of Appeals.

The *Pitney*[3] and *Slocum*[4] cases relied upon by the Court of Appeals are not determinative of the issue herein. The issue in each of those cases was whether a court had primary jurisdiction to entertain a suit alleging a breach of collective bargaining agreements between a carrier and a union involving an assignment of work. In *Pitney,* action was instituted in the federal courts, and in *Slocum,* suit was filed in the state courts. In each case, this Court held that exclusive primary jurisdiction to resolve disputes involving interpretations of agreements was in the Adjustment Board and not in the courts.

The Court below, however, relies on language of this Court in *Pitney* and *Slocum* that in determining the proper interpretation to be given to the collective bargaining agreements involved in those cases, the Adjustment Board must consider such evidence as usage,

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[3] *Order of Railway Conductors* v. *Pitney,* 326 U.S. 561 (1946).

[4] *Slocum* v. *Delaware, L. & W. R.R.,* 339 U.S. 239 (1950).

practice, and custom in the industry, and also any other agreements the carrier entered into with other unions. The Court below construed this language as an indication that the Adjustment Board was directed to consider both unions as parties to its proceedings and that the Adjustment Board must determine the rights under all agreements in one proceeding.

Even a cursory reading of these cases, however, shows that there is no basis for such construction. All this Court said in *Pitney* and *Slocum* was that the Adjustment Board was to consider all evidence including other agreements the Carrier had with other unions, in determining the proper application or interpretation to be given to the agreement which was the subject of the claim before it.

TCU's position is not to the contrary. This case does not involve a question of whether the Adjustment Board could consider evidence relating to any agreements between the Carrier and BRC as well as evidence concerning practice, custom, or usage which would be relevant to the claim before the Adjustment Board. The Carrier has not contended it was not given an opportunity to present any evidence it chose in the proceedings before the Adjustment Board nor is there any indication that the Adjustment Board refused to consider any evidence.[5]

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[5] There is nothing in the record or in fact to support the statement by the Court below that (R. 94):

> "Other contracts for what appeared to be the same job were excluded by its [the Adjustment Board's] rules of evidence."

Nor is there anything in the Rules of Procedure issued by the Adjustment Board to support the Court's finding. 29 Code of Federal Regulations, Chap. III, Sec. 301, contained in Circular 1, issued October 10, 1934.

The issue here is not whether the Adjustment Board can consider the agreement between the Carrier and BRC; the issue is whether the existence of such other agreement enlarges the jurisdiction of the Adjustment Board so as to require it to adjudicate not only the scope of the TCU agreement but also to adjudicate, in a manner binding on BRC, the meaning of the BRC agreement. This Court neither in *Pitney* nor in *Slocum* decided this issue.

Indeed, this Court has stated that the issue presented herein was not determined by this Court in those cases. Thus, in *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366 (1955), this Court stated (at 371-372):

> "Assuming the Act permits the Board to consider the claim of one union in light of competing agreements between Railroad and other unions, see *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, does it permit 'final and binding' awards to be rendered interpreting both contracts and resolving the independent claims of both unions in a single proceeding?"

The Court did not answer the question in *Whitehouse*. That question must be answered here for the Court below held that not only does the Railway Labor Act *permit* the Adjustment Board to make final and binding interpretations of both contracts, but the Act *requires* the Adjustment Board to do so. In any event, it is clear that neither *Pitney* nor *Slocum* answered the question.

The only case in which this Court discussed the issue presented herein is *Whitehouse* v. *Illinois Central R.R., supra.*

The *Whitehouse* case also was commenced when TCU filed a claim with the Adjustment Board that the

carrier had violated agreements between it and the carrier by not assigning the work in question to employees it represented. The carrier there also had assigned the work to employees represented by BRC. Unlike the present case, however, BRC was not given notice of the proceedings before the Adjustment Board. Before the Adjustment Board could issue a determination, the carrier sought an injunction to restrain the Adjustment Board from deciding the dispute until notice was given.

One of the carrier's contentions was that notice to BRC was necessary so that the entire dispute could be settled at one time, thus securing the carrier against the possibility of awards to both unions since an award to TCU would not prevent BRC from prosecuting a similar claim successfully.

This Court rejected this contention, stating (349 U.S. at 372):

> "One thing is unquestioned. Were notice given to Clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceedings. Clerks here have not attempted to intervene. They have merely stated an intention to bring a separate proceeding in case they are affected by an award in this case. Indeed Railroad refers to an understanding between Clerks and Telegraphers whereby the one will not intervene in proceedings initiated before the Board by the other, but will press its claims independently . . . . We would thus have to consider whether those potential injuries alleged to flow solely from failure of Clerks to participate may be the basis for judicial intervention where there is neither a legal right of the complaining party to be free from such injuries nor any assurance that judicial action will afford relief."

The Court of Appeals' holding in this case that the existence of an agreement between the Carrier and BRC "in effect" made BRC a party to the proceedings before the Adjustment Board, and that the Adjustment Board, was required to make a "complete disposition of the dispute as to all concerned parties" (R. 96), clearly is inconsistent with this Court's statement in *Whitehouse* that even if notice were given to the Clerks it could be "indifferent to it" and could "refuse to participate" in the proceeding. Certainly this Court did not mean that the Clerks had the privilege to surrender its rights by default, or that the Clerks had the power, by its refusal to participate, to render invalid any award in favor of TCU.

Furthermore, the holding of this Court in *Whitehouse* that the Adjustment Board could proceed with its determination of TCU's claim with no requirement that the Adjustment Board simultaneously make a binding interpretation of the meaning of the BRC agreement, contrary to the decision of the Court below, shows that the existence of other agreements between the carrier and another union does not extend the jurisdiction of the Adjustment Board to require it to determine the scope of the other agreement and the rights of employees covered by that agreement when a dispute concerning the other agreement is not before it.

The same result would be reached under common law in the absence of legislation.

In *Carey* v. *Westinghouse,* 375 U.S. 261 (1964), two unions subject to the NLRA were engaged in a dispute concerning the assignment of work. One of the unions claiming the work filed a grievance under its contract

with the employer contending that its agreement with the employer covered the disputed work and requested that the grievance proceed to arbitration as required by the agreement.

The employer refused to proceed to arbitration on the ground that the grievance involved a jurisdictional dispute between two unions which should be resolved by the NLRB pursuant to Section 10 (k) of the NLRA. This Court held that the employer was required to arbitrate the grievance. The Court stated (375 U.S. at 265-266):

> "Grievance arbitration is one method of settling disputes over work assignments; and it is commonly used, we are told. To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it. The case in its present posture is analogous to *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, where a railroad and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it. *Id.*, at 373.'"

The present case differs from *Carey* only in that arbitration has taken place in the present case in the form of the proceeding before the Adjustment Board,

while it was only prospective in *Carey*.[6] Since the Court, in *Carey*, directed the parties to arbitrate the dispute, it may be assumed that the award of the arbitrator would be valid and subject to enforcement.

The Court of Appeals for the Fifth Circuit has so construed the *Carey* case. In *International Brotherhood of Firemen and Oilers* v. *International Association of Machinists*, 338 F. 2d 176 (1964), suit was brought by the Machinists against the Oilers to enforce an arbitration award which required the Oilers to desist from its effort to represent certain maintenance employees. The Oilers contended that the Dis-

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[6] This Court has on numerous occasions held that the decisions of the Adjustment Board are to be treated as decisions of arbitrators. The latest opinion is that of *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965). There, the Court stated (at 263-264):

> "In *Brotherhood of Railroad Trainmen, et al.* v. *Chicago River & Indiana R. Co.*, 353 U.S. 31, the Court gave a Board decision the same finality that a decision of arbitrators would have. In *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, the Court discussed the legislative history of the Act at length and pointed out that 'it was designed for effective and final decision of grievances which arise daily' and that its 'statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . .' 360 U.S. at 616. Also in *Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as 'compulsory arbitration in this limited field,' p. 40, 'the complete and final means for settling minor disputes,' p. 39, and 'a mandatory, exclusive, and comprehensive, system for settling grievance disputes.' P. 39."

Such finality of Adjustment Board awards was recently confirmed by Congress in Public Law 89-456, approved June 20, 1966, Appendix, p. 11a.

trict Court should have declined to enforce the award in view of the necessity of interpreting certifications of the NLRB and because the award would not be final and binding and would conflict with the jurisdiction of the NLRB which has ultimate authority in representation matters.

The Court of Appeals held that this Court's decision in *Carey* supported the decision of the District Court with respect to the jurisdiction of the arbitrator to determine the dispute. With respect to the jurisdiction of the District Court to enforce the award of the arbitrator, the Court stated (338 F. 2d at 179):

> "The District Court here went one step further. It enforced the award of the arbitrator. We find no error in this action. It is in logical sequence to the requirement that arbitration be compelled. Jurisdiction to enforce such award follows as a matter of course once the requisite jurisdiction of the arbitrator is found. Cf. United Textile Workers of America v. Textile Workers Union, 7 Cir., 1958, 258 F. 2d 743, affirming the judgment of the District Court enforcing an award by the same arbitrator, and under the same contract here involved."

Similarly in the present case, after the jurisdiction of the Adjustment Board to rule on the dispute presented to it is determined, the award is entitled to be enforced and is valid at least with respect to any procedural requirement. No other defect is alleged or can be made the basis of attack on the Award. P.L. 89-456; *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965).

Moreover, this Court's holding in *Carey* that arbitration must proceed despite the absence of the other union, shows that the existence of other agreements

between the employer and other unions does not require a determination of the scope of those other agreements nor a determination of the rights of employees under such agreements.

The Carrier has argued that the Adjustment Board cannot be permitted to determine TCU's claim without determining the rights of employees represented by BRC under BRC's agreement with the Carrier, because this would entail a finding that it is possible that the Carrier has contracted with both unions concerning the work in dispute. The Carrier contends that such a finding would be contrary to Section 2, Ninth of the Railway Labor Act which requires that a carrier bargain only with the certified representative of its employees. To support the contention it cites *Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515 (1937) which holds that a certified union can obtain injunctive relief to require a carrier to recognize and bargain with the certified representative of its employees and to restrain the carrier from bargaining with any other organization. The Carrier's argument, however, confuses the issue in this case and is without merit.

Section 2, Ninth of the Railway Labor Act is concerned solely with issues of representation; the issue in this case, however, is not at all concerned with representation.

There is no quarrel that TCU represents telegraph employees of the Carrier and that BRC represents clerical employees. TCU's claim did not seek or involve a determination from the Adjustment Board that TCU is the representative of the clerical employees now assigned to the disputed work. TCU sought, and obtained, an Award and Order from the Adjustment Board declaring only that the collective bargaining

contract between TCU and the Carrier was breached when the Carrier failed to assign the disputed work to telegrapher employees represented by TCU.

We know of no cases in which this Court or any court has determined that an employer may contract with as many labor organizations as it desires, assigning the same work to different groups of employees represented by different labor organizations, without any contractual liability to the groups of employees who are thereafter not assigned to perform the work covered in the agreements. The National Railroad Adjustment Board was created to deal with such breaches of agreement; it has performed its function in this case, and its Award and Order should be enforced.

In *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366 (1955), this Court stated very plainly that a carrier would be liable to each of the unions with which it contracted to assign the same work. Thus, in discussing the contention of the carrier that the presence of the BRC before the Adjustment Board was necessary to avoid the possibility of conflicting Adjustment Board awards, the Court stated (at 372):

> ". . . . We would thus have to consider whether those potential injuries alleged to flow solely from the failure of Clerks to participate may be the basis for judicial intervention *where there is neither a legal right of the complaining party to be free from such injuries* nor any assurance that judicial action will afford relief." (Emphasis added.)

In *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (D.C. Cir. 1942), the Court stated (at 249):

"But if it were shown that the carrier had bound itself by conflicting contracts allocating the work, and thus the dilemma were complete, it would not follow that the enforcement suit is inadequate or was not intended to be exclusive or that declaratory relief would be appropriate. We know of no constitutional protection against the subject matter nor of any which renders inadequate a proceeding, otherwise sufficient, merely because others not parties to it may assert claims inconsistent with its result and perhaps succeed in sustaining them by independent litigation. The risk of multiple liability, that is, the possibility that two or more claimants may assert, severally and independently, similar causes of actions covering identical subject matter is an everyday occurrence."

CONCLUSION

For the foregoing reasons and upon the foregoing authority it is respectfully submitted that the decision of the Court of Appeals should be reversed with direction that the case be remanded to the District Court for further proceedings on TCU's complaint to enforce Award No. 9988 of the Adjustment Board.

Respectfully submitted,

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August 25, 1966.

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APPENDIX

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APPENDIX

The Railway Labor Act

Being An Act to Provide for the prompt disposition of disputes between carriers and their employees and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

* * *

SECTION 2. Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days

designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

• • •

SECTION 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor

members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees,

signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly

submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the

Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respect as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be

included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with

the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

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The National Labor Relations Act

SECTION 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

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(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

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(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

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HEARINGS ON JURISDICTIONAL STRIKES

SECTION 10 (k) Whenever it is charged that any person has engaged in an unfair labor practice within the mean-

ing of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

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On June 20, 1966 Congress enacted Public Law 89-456 (80 Stat. 208) which amended Section 3 of the Railway Labor Act. Public Law 89-456 is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, Second, of the Railway Labor Act is amended by adding at the end thereof the following:

"If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to

agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitut the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall ecase to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or ap-

pointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

SEC. 2. (a) The second sentence of section 3, First, (m), of the Railway Labor Act is amended by striking out, "except insofar as they shall contain a money award".

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: "In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination."

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof "shall be conclusive on the parties".

(d) The last sentence of section 3, First, (p), of such Act is amended by inserting before the period at the end thereof the following: ": *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order".

(e) Section 3, First, of such Act is further amended by redesignating paragraphs (q) through (w) thereof as para-

graphs (r) through (x), respectively, and by inserting after paragraph (p) the following new paragraph:

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

Approved June 20, 1966.

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